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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 317

B. F. DIAMOND CONSTRUCTION COMPANY, INC.
AND DIAMOND MANUFACTURING COMPANY, INC.,

Petitioners,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DANIEL R. COFFMAN, JR.
Attorney for Petitioners
1623 Barnett Bank Building
Jacksonville, Florida 32202

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, B. F. Diamond Construction Company, Inc. and Diamond Manufacturing Company, Inc., by and through their undersigned counsel, petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on May 12, 1969.

OPINIONS BELOW

The decision of the Court of Appeals (Appendix, *infra*, pp. A-1 to A-2, Vol. IV, Certified Record herein) is reported

at ..... F.2d ..... (5th Cir. 1969), 71 LRRM 2112. The decision and order of the National Labor Relations Board (Vol. III, p. 128. Certified Record herein), which was enforced by the said decision and judgment of the Court of Appeals, are reported at 163 NLRB No. 25 (1967), 64 LRRM 1333 (1967).

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1969 (Vol. IV, Certified Record). Petitioners, B. F. Diamond Construction Company, Inc. and Diamond Manufacturing Company, Inc., (Respondents below), filed a petition for rehearing in the Court of Appeals on May 28, 1969, which was denied on June 4, 1969 (See Vol. IV, Certified Record). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 10 (e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e).

QUESTION PRESENTED

Whether the Court of Appeals "grossly misapplied" the standard of review set forth in *Universal Camera Corporation v. National Labor Relations Board,* 340 U.S. 474, 71 S.Ct. 456 (1950), by affirming the Board's finding that Petitioner violated Sections 8 (a)(5) and (1) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) when the Board's finding is not supported by substantial evidence on the record considered as a whole.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

"Sec. 8. Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

(5) to refuse to bargain collectively with the representatives of his employees . . . [29 U.S.C.A. § 158(a)(5)]", and

"Sec. 10. Prevention of Unfair Labor Practices

* * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeal to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by

the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28." [29 U.S.C.A. § 160 (e)].

STATEMENT OF THE CASE

I. Jurisdiction of the lower court

The jurisdiction of the Court of Appeals for the Fifth Circuit was based on Section 10 (e) of the National Labor Relations Act, as amended (hereinafter called the Act).

II. The Facts

In May, 1965, the Union[1] filed a representation petition with the Board seeking to represent the marine employees aboard Employer's[2] tugboats and work boats. The Employer voluntarily signed an agreement for a consent election and also agreed to a mail ballot election. Without engaging in any anti-union campaigning, the election was held and resulted in the Union being certified on July 1, 1965, as the bargaining representative for the above employees. (JA 405-406; 346).[3] The Union requested the first bargaining session on July 26, 1965 and the first meeting was held on July 30, 1965. (J.A. 648, 348, 216, 218). Between July 30, 1965, and April 28, 1966, the parties met 17 times for the purpose of negotiations (R. 35). On January 17, 1966, the Union filed charges against the Employer alleging, *inter alia*,

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[1] Associated Maritime Workers Local No. 8, affiliated with the International Organization of Masters, Mates, and Pilots, AFL-CIO.

[2] B. F. Diamond Construction Company, Inc., and Diamond Manufacturing Company, Inc.

[3] "J.A." refers to the Joint Appendix in the Court below which is included in Volumes I and II of the Certified Record herein; "R" refers to the Transcript of Record in the Court below which is included in Volume III of the Certified Record herein.

that the Employer had violated Section 8(a)(5) of the Act (R. 9-10). On March 15, 1966, a Complaint was issued by the Regional Director, National Labor Relations Board, Region 12 (R. 14-21). From May 9 to May 16, 1966, a hearing was held before Trial Examiner David S. Davidson, who, on September 28, 1966, issued his Decision and Recommended Order in which he found that the Employer had violated Section 8(a)(5) and Section 8(a)(1) of the Act by failing to meet at reasonable times with the Union and by failing to furnish the Union certain information and in other ways failing to negotiate in good faith. (R. 32-112). On February 28, 1967, the Board affirmed the Trial Examiner's Decision (R. 128-129). On May 12, 1969, the Fifth Circuit Court of Appeals enforced the order of the Board (R. 806; Appendix; *infra*, p. A-3).

ARGUMENT

THE FACTS IN THIS CASE CLEARLY REVEAL THAT THE COURT OF APPEALS "GROSSLY MISAPPLIED" THE STANDARD OF REVIEW SET FORTH IN UNIVERSAL CAMERA CORPORATION V. NATIONAL LABOR RELATIONS BOARD, 340 U. S. 474, 71 S. CT. 456 (1950). THE FACTS REVEAL THAT THE EMPLOYER DID NOT VIOLATE SECTIONS 8 (a) (1) AND (5) OF THE NATIONAL LABOR RELATIONS ACT.

Perhaps the most important period in negotiations is the initial contact and meeting between employer and union. How the union handles such initial contact very often sets the course and relationship to follow. Looking to the instant record, some revealing facts are shown.

Although the Board's Certification of Bargaining Representative issued on July 1, 1965, it was not until Monday,

July 26, 1965, that Union President Allen C. Scott hastily sent a Western Union night letter (J.A. 648; 216) to the Employer suggesting that the first meeting be held in Savannah, Georgia (headquarters and main office of the Employer) "at eleven AM Thursday, July 29, 1965 *** at the Manger Hotel or Heart of Savannah Motel." (J.A. 648).

The Union's night letter of July 26, 1965, was received by the Employer on Tuesday, July 27, 1965. On Wednesday at 9:30 A.M., July 28, 1965, Union President Scott surprisingly sought the "assistance" and "help" of the Federal Mediation and Conciliation Service "to ascertain if they [the Employer] had received the telegram and if they were going to respond or what the situation was." (J.A. 348; 218).

After the Federal Mediator telephoned the Employer's Vice-President and General Manager E. R. Stuber at Savannah (at the request of the Union), Mr. Stuber telephoned Union President Scott at Jacksonville and agreed to hold the first meeting on Friday, July 30, 1965 at 10:00 A.M. at the Manger Hotel, Savannah (J. A. 218).

Accordingly, it is clear that the Union, not the Company, delayed from July 1 to July 26 to commence negotiations. As if to make up for lost time, the Union wanted the meeting almost immediately. In evaluating the Employer's motives relative to dilatory tactics, it is significant to note that the Employer agreed to meet just three days after receiving the Union's initial communication. It is also significant to note that the Union had failed to send the Employer its contract proposal prior to the first meeting on July 30, 1965.

Instead of furnishing the Employer a copy of its proposal prior to the first meeting, the Union, after having four weeks within which to prepare, slapped on the table a complete contract that the Employer had never before seen (J.A. 491-504). Twice the Employer suggested they adjourn the first

meeting to give the company officials time to review in private the Union's contract. The Union refused to adjourn on this reasonable basis and, moreover, stated through its Mr. Hicks:

> "We are here to meet day-for-day, around the clock or whatever is necessary, but we are here to negotiate a complete agreement, and sign it-----" (J.A. 23).

The Employer's request at the first meeting to adjourn and give it time to study the Union's contract was eminently reasonable and logical. Had the Union honored this request, instead of using the Federal Mediator and pressure tactics at the crucial initial contact, the Employer's approach to dealing with the Union would surely have been more amicable.

The Union's demand to meet on a daily basis and negotiate around the clock was repeated by the Union at the second meeting on August 10, 1965, but, of course, there were no prior arrangements to meet on such a schedule. Thus, the Union's repeated and premature demands for around the clock negotiations on the initial contract gained the Union nothing -- it merely made the Employer that much more cautious in dealing with the other side of the table.

One of the serious mistakes the Union made in dealing with the Employer was to take the position at the third meeting on September 10, 1965 that the Employer had agreed to over seventy-five percent of the contract in less than 2½ hours of negotiations at the second meeting in Jacksonville on August 10.

Mr. Crumrine of the Employer was shocked and dismayed at the third meeting to hear the Union seriously and vigorously contend that the company substantially bound itself to a labor agreement at the second meeting.

By Mr. Hicks insisting, over Mr. Crumrine's objections, on September 10 that the latter had agreed to over seventy-five percent of the Union's demands, the Union effectively shattered all confidence in the Employer that it could deal in good faith with the Union.

In a rare display of impartiality, the trial examiner could not buy the Union's story and discredited[4] Mr. Hicks' fantastic version. But the examiner, in ultimately finding the Employer guilty of improper bargaining, utterly failed to consider the real significance of this breach in the parties' relationship. The *Union's* bad faith, instead of being condemned, is almost excused by the examiner. But there was no requirement that the Employer excuse, forgive or forget the Union's rank and gross bad taste and bad faith in this instance.

Any person once dealt with sharply by another person is bound to (and is wiser to) proceed further out of an abundance of caution. Too often the Board believes that an employer can be dealt with by a Union in some despicable fashion but must, under the requirements of Section 8(a)(5), turn the other cheek and cheerfully enter into a permanent contractural relationship. If the Union herein lacked confidence that Employer would give it a good contract, one should contemplate the lack of confidence in the Union experienced by the Employer after the September 10, 1965 incident.

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[4] The examiner stated: "In these circumstances and in view of the implausibility of Hicks' claim that Crumrine agreed to most of the non-cost items proposed by the Union during this short meeting notwithstanding his complaints over the speed at which the Union wanted him to move, I do not credit Hicks' testimony that Crumrine agreed to all the sections which were incorporated in the document presented to Respondents at the next meeting." (R. 46-47).

If the Employer was not eager to have frequent and lengthy meetings with the Union, it should be understandable in view of the Union's sharp treatment at the first three meetings.

Considering the above background, exactly what was required of Employer under the Act?

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees***". Section 8(d) amplifies and states that:

> "*** to bargain collectively is the performance of the mutual obligation of the employer *and the representative of the employees* to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession****". (Emphasis added).

In 1947 Congress passed the Taft-Hartley Act, in which Section 8(d) was added to give us an explicit definition of the duty to bargain. The above language shows that Congress expressed the apparent intention to impose the duty to bargain but not to prescribe the techniques of bargaining, the terms of bargaining, or a duty to agree.

Earlier this Court had ruled in the *Jones and Laughlin Steel Co.* case[5] that:

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[5] *NLRB v. Jones and Laughlin Steel Co.*, 301 U.S. 1 (1937).

> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer from refusing to make a collective contract and hiring individuals on whatever terms the employer may by unilateral action determine. The theory of the Act is that free opportunity for negotiation with accredited representatives of the employees is likely to promote industrial peace and may bring about the adjustments which the Act itself does not attempt to compel."

In later years after Taft-Hartley, this Court had occasion to reprimand the Board on its approach to refusal to bargain cases. In agreeing with the Fifth Circuit,[6] the Supreme Court ruled that the obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained, nor does it permit the Board, under the guise of a finding of bad faith, to require the employer to contract in a way which the Board might deem proper. The Court went on to say:

> "It is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of a frank statement and support of his position. And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of the collective bargaining agreement. Whether the contract should contain a clause

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[6] *American National Insurance Co. v. NLRB*, 187 F.2d 307 (5th Cir. 1951). Cf. *American Ship Building Co. v. NLRB*, 379 U.S. 814 (1965); *NLRB v. Cummer-Graham Co.*, 279 F.2d 757 (5th Cir. 1960); *Dierks Forest, Inc.*, 148 NLRB No. 92 (1964); *NLRB v. General Tire & Rubber Co.*, 326 F.2d 832 (5th Cir. 1964).

fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board." *American National Insurance Co. v. NLRB*, 343 U.S. 395 (1952).[7]

The Board maintained, that the Employer refused to meet with the Union at reasonable times for contract negotiations. Did it so refuse when the record is carefully examined?

The following seventeen (17) meetings were held during the period July 30, 1965 - April 28, 1966:

1. July 30, 1965
2. August 10, 1965
3. September 10, 1965
4. September 11, 1965
5. October 7, 1965
6. October 20, 1965
7. November 10, 1965
8. November 22, 1965
9. December 3, 1965
10. January 6, 1966
11. January 21, 1966
12. February 3, 1966
13. February 17, 1966
14. March 10, 1966
15. March 30, 1966
16. April 14, 1966
17. April 28, 1966

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[7] See Cox, "The Duty to Bargain in Good Faith," 71 Harv. L.Rev. 1401 (1958); Fleming, "The Obligation to Bargain in Good Faith," 47 Va.L.Rev. 988 (1961); Benetar, "The Boundaries of the Duty to Bargain in Good Faith Under the NLRA," 15 Baylor L.Rev. 127 (1963).

Perhaps seventeen (17) meetings in nine (9) months does not impress the Board or the Court below, but such meetings gave the parties adequate time to fully discuss all of the Union demands. Considering that the parties were averaging two meetings a month and that the Employer was negotiating without a lawyer, it is submitted that the Employer met at reasonable times.

The Trial Examiner's analysis of the quantitative bargaining procedural facts only served to underscore one obvious fact: the Union and Employer had many differences, including the frequency of meetings.[8]

Another difference between the parties concerned the furnishing of information to the Union. What the Board really argued in the Court below was not that the Employer failed to furnish relevant data but that it unreasonably delayed in furnishing data relevant to subjects of bargaining. However, the record does not support the Board but affirmatively shows that on October 20, the sixth meeting, the Employer gave the Union information concerning wages, hours and working conditions (J.A. 605-615). The record shows that it was not until September 11 that the Union specifically requested information (J.A. 596). The Union's vagueness in requesting data was at the heart of any delay on the Employer's part. Even at the hearing before the trial examiner it was apparent that the Union had been very vague in re-

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[8] On the quantitative aspect of bargaining see *NLRB v. American Aggregate Co.*, 335 F. 2d 253 (5th Cir. 1964) (32 bargaining sessions). Cf. *Philip Carey Mfg. Co.*, 140 NLRB 1103 (1963) enf'd. 331 F.2d 720 (Board, *inter alia*, rejected the trial examiner's finding of bad faith bargaining where 11 bargaining meetings found agreement on many major questions, but at the 11th meeting the employer presented its final offer; the union rejected it because of an objectionable seniority clause; seven other meetings later neither party budged).

questing data. The Trial Examiner also felt this way when he interrupted Mr. Hick's testimony:

> TRIAL EXAMINER [interrupting]
>
> Mr. Hicks, you said twice, I think, the request was for certain items -- and things of this nature. Can you recall exactly what Captain Scott said when he made the request to Mr. Crumrine?
>
> THE WITNESS:
>
> Word-for-word, maybe not, but I'm familiar with what he requested, because this is something we do always in negotiations. It was the wages, the working conditions, overtime, any hospitalization coverage that the employees might have, bonuses -- this is what I meant -- the things that was mentioned.
>
> TRIAL EXAMINER:
>
> Well, was his request phrased in terms of certain things? Now, did he say to Mr. Crumrine -- other things of this nature? This is what I'm trying to find out -- what this request was for.
>
> THE WITNESS:
>
> Well, this is what I said -- he asked for these things necessary to negotiate, and these things are usually what is termed as cost items" (J.A. 15-16).

On April 14, 1966, the Union made another verbal and ambiguous request for information. Thus on April 22, 1966, the Employer wrote the Union a letter (J.A. 652) stating "Please advise in writing the exact information you requested at our last meeting on April 14, 1966". The Union failed and refused to respond to this request, indicating that their

demands for information were for purposes of harassing Employer.

The Board asserted in the Court below that the Employer "*** never did furnish information on the 1963 Christmas bonus, or provide the Union with a copy of its group life insurance contract." It is significant to note that the Union requested a copy of "the master insurance policies" (J.A. 656) and that the Employer furnished the Union a copy of its group disability policy (page 925 of original transcript). See also J.A. 417 and 649.

Moreover, the Union was furnished information relative to the 1964 and 1965 Christmas bonuses and would have been furnished the 1963 information had the Union done more than just demand it as a matter of right. It is axiomatic that the only data to which a union is entitled is that which is relevant. *NLRB v. Tex-tan, Inc.*, 318 F.2d 472 (5th Cir. 1963); *NLRB v. Clegg*, 304 F.2d 168 (8th Cir. 1962).

Accordingly, when the record is fairly examined it is clear that the Employer fulfilled its obligation to furnish relevant data to the Union (J.A. 416-417).

In *Majure Transport Co. v. NLRB*, 198 F.2d 735 (5th Cir. 1952) the Fifth Circuit held that an employer was required to bargain in good faith although it was under no compulsion to accept a union proposal or make a counterproposal or concession. The test used to insure reconciliation of an employer's privilege and obligation under the statutory collective bargaining provisions was said by the Court to be a "fair appraisal of the circumstances and the particular facts of a particular case."

In *White v. NLRB*, 255 F.2d 564 (5th Cir. 1958) the Fifth Circuit ruled that failure of the employer to concede "any-

thing substantial" did not amount to bad-faith bargaining in view of the provisions of Section 8(d). The Court said:

> "The Board is saying that although the statute says no concession need be made and no item need be agreed upon, if a company fails to concede anything substantial, then this is too much, and such failure amounts to bad faith. We find no case that precisely supports the proposition here asserted by the Board."

The Board brushed aside Employer's evidence showing that its record at the bargaining table demonstrates that Employer was willing to negotiate and sign a contract with the Union, and the Fifth Circuit refused to disturb that ruling. Contrary to the Board's findings, Employer submitted many counter-proposals (J.A. 624-642; 651). Moreover, the record is void of *any* independent Section 8(a)(1) violations by Employer.

It is submitted that the record abundantly shows that Employer has not violated its statutory duty under the Act. The fact that Employer has not capitulated to the Union demands and the fact that no agreement has been reached, should not give rise to an inference of bad faith. The Union showed at the hearing that it treated the Employer sharply during negotiations. Negotiations for a first contract are crucial for the Employer as well as the Union. The parties will live for years with the results of their bargaining. The Employer was well aware of this and wanted to proceed carefully and cautiously. For its part, the Union was unreasonable in its demands and wanted to bull and pressure its way into a quick contract. It did not work and probably never has worked for this Union. The negative result should not be a penalty against the Employer. *NLRB v. Express Publishing Co.*, 128 F.2d 690 (5th Cir. 1942); *NLRB v. Cosco Products Co.*, 280 F.2d 905 (5th Cir. 1960).

It is clear from the evidence in the record that the Fifth Circuit has grossly misapplied the standards of review set forth in *Universal Camera Corp. v. NLRB, supra.* Petitioners submit that the evidence in the record does not support the Board's finding that the Employer violated Sections 8 (a) (1) and (5) of the National Labor Relations Act, but rather establishes that the Employer met its statutory duties to bargain with the Union in good faith.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in the instant case.

Daniel R. Coffman, Jr.

DANIEL R. COFFMAN, JR.
Attorney for Petitioners

Address of Counsel:

1623 Barnett Bank Building
Jacksonville, Florida 32202

July 1969.

APPENDIX

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25471

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

B. F. DIAMOND CONSTRUCTION COMPANY, INC. and DIAMOND MANUFACTURING COMPANY, INC.,

Respondents.

Petition for Enforcement of an Order of the National Labor Relations Board (Florida Case)

(April 23, 1969)

Before BROWN, Chief Judge, THORNBERRY, Circuit Judge, and TAYLOR, District Judge.

PER CURIAM: This is another of the frequent cases in which the Board petitions for enforcement of its bargaining order, entered after finding that the Employer violated § 8 (a) (5), 29 U.S.C.A. § 158(a) (5). As with so many, it illustrates again that the supposed speed of administrative pro-

ceedings may be very questionable.[1] We conclude without difficulty that the Board's findings are supported by substantial evidence on the record considered as a whole. We therefore enforce.

Briefly, the Board found that the Company (1) did not satisfy the statutory obligation to meet at reasonable times with the Union, (2) failed to furnish information necessary and relevant to bargaining, and (3) in other ways failed to negotiate in good faith with the Union, in violation of section 8(a) (5) and (1) of the Act. Since one such violation is enough to trigger the § 8(a) (5) order, no particularly useful purpose would be served by detailing the evidence upon which the Trial Examiner and Board based their findings and conclusions. It is sufficient to say that, as usual, there was a certain amount of conflicting testimony which required credibility resolutions – a function peculiarly within the province of the Trial Examiner and the Board. *See, e. eg., NLRB v. May Aluminum, Inc.*, 5 Cir., 1968, 398 F.2d 47, 51; *NLRB v. Tidelands Marine Serv., Inc.*, 5 Cir. 1964, 338 F.2d 44, 47; *Martin Sprocket & Gear Co. v. NLRB*, 5 Cir., 1964, 329 F.2d 417, 420.

On our thorough examination of the record in the light of applicable standards, we conclude that substantial evidence on the record as a whole supports the Board's finding that the company failed to bargain with the Union in good faith, in violation of § 8(a) (5) and (1) of the Act. See *Universal Camera Corp. v. NLRB*, 1950, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456. That is the end of it. At long last the end is declared.

ENFORCED.

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[1] The Board's decision and order of February 28, 1967, are reported at 163 NLRB No. 25. The Union was certified on July 1, 1965. Thus nearly four years have gone by—presumably with neither contract nor bargaining since April 28, 1966.

(Caption omitted)

Filed May 12, 1969

JUDGMENT

Before: Brown, Chief Judge, Thornberry, Circuit Judge, and Taylor, District Judge:

By the Court:

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for enforcement of a certain order issued by it against the Respondents B. F. Diamond Construction Company, Inc., and Diamond Manufacturing Company, Inc., their officers, agents, successors, and assigns, on February 28, 1967. The Court heard argument of respective counsel on November 4, 1968, and has considered the briefs and transcript of record filed in this cause. On April 23, 1969, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said Order of the National Labor Relations Board in said proceedings be enforced and that B. F. Diamond Construction Company, Inc., and Diamond Manufacturing Company, Inc., their officers, agents, successors, and assigns, abide by and perform the direction of the Board in said order contained.

(Caption omitted)

Filed June 4, 1969

ON PETITION FOR REHEARING

Before BROWN, Chief Judge, THORNBERRY, Circuit Judge, and TAYLOR, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition For Writ of Certiorari has been served this 8th day of July, 1969, upon the following by air mail:

Marcel Mallet-Prevost, Esquire
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

Solicitor General
Department of Justice
Washington, D.C. 20530

Daniel R. Coffman, Jr.
Attorney

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No. 317

In the Supreme Court of the United States

OCTOBER TERM, 1969

B. F. DIAMOND CONSTRUCTION COMPANY, INC., AND DIAMOND MANUFACTURING COMPANY, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

NAN C. BABES,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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CITATIONS

Case:

Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474 10

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

Section 8(a)(1) 9
Section 8(a)(5) 9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A - 1-2) is not yet officially reported. The Board's decision and order are reported at 163 NLRB No. 25.

JURISDICTION

The judgment of the court of appeals (Pet. App. A - 3) was entered on May 12, 1969, and petitioners' timely petition for rehearing (Pet. App. A - 4) was

denied on June 4, 1969. The petition for a writ of certiorari was filed on July 9, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioners failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set out at page 3 of the petition.

STATEMENT

A. The Board's Findings of Fact

Following the Union's [1] certification on July 1, 1965, as representative of the marine employees aboard the Company's [2] tugboats and work boats, the Union and the Company held 17 meetings for the purpose of negotiating a collective bargaining agreement. At the initial session on July 30, the Union

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[1] Associated Maritime Workers Local No. 8, affiliated with the International Organization of Masters, Mates, and Pilots, AFL-CIO.

[2] B. F. Diamond Construction Co., Inc., and Diamond Mfg. Co., Inc., petitioners, are Georgia corporations operated as a single integrated business enterprise.

presented a standard contract proposal to be used as a guide to negotiations, and agreement was reached on the preamble and recognition clauses and layoffs and grievances sections (R. 38-40; J.A. 17-18, 21-23, 26-28, 108-109, 114-116, 374, 414, 491-492, 498).[3] During the meeting, Union president Scott requested information concerning wages, rates of pay, hospitalization, insurance, bonuses and other terms and conditions of employment then in effect for employees in the unit (R. 37-38; J.A. 14-17, 110, 114-116, 267-268, 362-364, 366-367, 374-375, 377-378, 462-464). Company superintendent Crumrine replied that it was against Company policy to divulge this information, and suggested that the Union obtain the information from the employees (R. 38; J.A. 15-18, 111-113, 263-264, 454, 462). When Crumrine was asked how long he thought it would take to reach an agreement, he replied, "The law only requires that Companies negotiate. It doesn't require the Companies to reach an agreement, and we only propose to go as far as the law requires." He added, "We've been negotiating with another union three or four years and we are still negotiating. Guide yourself accordingly" (R. 42; J.A. 33-35, 224-225, 359-360, 389-390).

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[3] "R." refers to the Transcript of Record in the court below which is included in Volume III of the certified record herein; "J.A." refers to the Joint Appendix in the court below which is included in Volumes I and II of the certified record herein. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

The parties met again on September 10 and 11.[4] They considered the Union's proposal based on the previous discussions and initialed the sections upon which agreement was reached.[5] (R. 49-50; J.A. 48-74, 391-392, 424-425). The Union requested information relevant to cost items that it wished to negotiate, but its request was again denied (R. 50-51; J.A. 596). No new agreements were reached at the September 11 meeting, which adjourned at 2 p.m. because company negotiators had to leave. Following lunch on September 11, Crumrine invited Scott and Union treasurer Hicks for a drink. When Scott expressed the hope during the conversation that agreement could be reached by the first of the year, Crumrine replied: "Scott, don't be naive. The Companies don't intend to ever sign an agreement with your Union" (R. 51-52; J.A. 368-370, 78-80, 270-271).

On September 15 the Company cancelled the meeting scheduled for the following day but promised to

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[4] At an intervening meeting on August 10, Crumrine attempted to reopen discussion of the recognition clause previously agreed to and sought an early adjournment of the meeting because he had to leave on a business trip (R. 43; J.A. 34-45). Crumrine said he would call the Union on August 20 to arrange the next meeting, but he failed to do so and did not return Scott's telephone calls. Scott finally reached Company vice-president Stuber on August 25 and arranged meetings for September 10 and 11. (R. 48-49; J.A. 46-47, 227-232, 594-595.)

[5] Although Union treasurer Hicks had been under the impression that agreement had been reached on several sections at the previous meeting, the Board found that on July 30, the parties had reached agreement only on preamble, recognition, layoffs and grievance handling (see p. 3, *supra*; R. 39-40, 44-48).

propose a substitute date (R. 52-53; J.A. 77, 232-233). Having heard nothing by September 28, Scott called Company vice-president Stuber who said he had no time for a meeting, adding, "I can't give you any commitment whether we will ever meet again." When Scott stated that it appeared Stuber was stalling, Stuber responded, "You and I both know what is going on" (R. 53-54; J.A. 233-235). At Stuber's suggestion, Scott sent a letter requesting a meeting and reiterating the Union's previous requests for information concerning various cost items (R. 54; J.A. 596-597, 237-238, 364).

At the next meeting on October 7, Stuber told Hicks that, before negotiating further, he wanted the Union to prepare a new contract proposal setting forth all of the Union's demands. Hicks protested that the purpose of the meeting was to negotiate the remaining sections of the standard contract and complained that Stuber had waited until the meeting to request a new proposal. Stuber said he "couldn't help that" but that if the Union would submit a proposal by October 13, the Company would accept or reject it on October 20 (R. 55-56; J.A. 84-87, 144-145). Hicks agreed to submit a new proposal with the understanding that it would not jeopardize sections previously agreed to by Crumrine (R. 57; J.A. 87). When Hicks again requested information with respect to the hours, rates of pay, and working conditions of employees in the unit, Stuber flatly refused to furnish the information, telling Hicks to get it from the employees (R. 55-56; J.A. 83-84, 144-145, 129-134). In response to Hicks' request for

information concerning hospitalization insurance, Stuber said that the Company would supply it. The Company, however, refused to give the information to Hicks in time to utilize it in preparation of the new proposal requested by the Company (R. 56-57; J.A. 92-93, 145-146, 84-86, 130-132).

The parties met on October 20 to discuss the new proposal submitted by the Union. With respect to each section covering cost items—*e.g.*, days and hours of work, wages, overtime, minimum manning level, and sick leave—the Company counterproposed that existing conditions be continued without change (R. 59; J.A. 152-158, 161-167, 170-177, 447, 479). But when the Union suggested a provision affirming the continuation of existing seniority policy, Stuber rejected it, stating that the men knew what it was and the Company would not change it (R. 60-61; J.A. 158-159, 541, 167-168, 303, 544-555, 546-547, 176-177). Scott pressed for further discussion of a proposed new wage scale and a reduction in hours, but Stuber asked to put off the matter until November 19. When Scott protested that the delay was unreasonable, Stuber agreed to meet on November 10.

At the November 10 meeting, Stuber indicated that the Company's wage proposal was unchanged "at this time." Scott asked Stuber for the Company's current policy, in writing, relating to the cost provisions of the proposed contract (R. 65-66; J.A. 202-206, 268-269, 573-574). Although this request was subsequently met in part, some of the information sought was incomplete and some of it was never produced (R. 67-68; J.A. 278-291). No further progress was made at this meeting.

A special employees' committee attended the next meeting, on December 3, for the purpose of learning what progress had been made (R. 70; J.A. 397-398). Stuber reaffirmed the Company's position, adding that the Company had a voluntary method of raising wages and did not need a union to negotiate them, and that he thought higher wages might be forthcoming under other conditions (R. 70; J.A. 398-401, 415-416). After reviewing the several provisions, Stuber commented that they provided nothing that the men did not already have, noting specifically that the provision of the "Dockside Work" section had been in effect for 15 years. When Hart, an employee member of the Union's negotiating team, thereupon asked if it were the Company's position that it would do nothing it had not done for 15 years, Stuber responded, "I'm glad you are getting the point" (R. 70; J.A. 401-402).

No progress was made at the next meeting on January 6, 1967 (R. 71-72; J.A. 289-290, 292-295, 322, 617, 326). Following this meeting, the Union, on January 17, filed charges with the Board's Regional Office that the Company had refused to bargain in good faith (R. 72).

At the meeting on January 21, the Union pointed out that the Company's "strikes" proposal, which barred any form of work stoppage and allowed the Company to terminate the agreement if the Union did not return striking employees to work within 24 hours, was unreasonable because any group of dissident employees could defy the Union and give the Company the right to terminate the agreement (R.

60, 73; J.A. 316-317, 442-447, 617). Stuber suggested a modification which Scott took under advisement (R. 73-74; J.A. 318-319). At the next meeting, on February 3, Scott offered to accept the modification, but Stuber then stated that the modification had merely been discussed, not offered, and that the Company's proposal remained as originally presented on October 20. Scott offered another modification which Stuber took under advisement and rejected at the following meeting, on February 17 (R. 75-76; J.A. 319-322).[6] When asked at this meeting whether he would make any better offer at all with respect to cost items, Stuber replied that the Company would not change its position, but that perhaps the employees might wish to change their representative (R. 76; J.A. 432-433, 482).

The parties met again on March 10 and 30 and on April 14. At the April 14 meeting, the Company deviated from its initial position that a seniority provision was unnecessary since the existing practice would remain in effect (R. 61; J.A. 167-168, 303, 544, 555). The Company proposed a seniority provision which the Union regarded as being more stringent than the Company's current practice and as modify-

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[6] A meeting that had been scheduled for February 4 was cancelled by Stuber on grounds that the parties were making no progress and therefore had no need for a meeting the following day (R. 75; J.A. 240). Following the February 17 meeting, Scott requested that the parties next meet on February 28, and reiterated his request for daily meetings thereafter. Stuber replied that he would meet on March 3 if the Union withdrew the unfair labor practice charges which it had filed (R. 77-78; J.A. 243-246, 248-250, 426-428).

ing provisions which already had been agreed upon (R. 80-81; J.A. 615-616, 382-386, 303-306, 390-396). On April 28, the final meeting before the unfair labor practice hearing, Scott asked Stuber if he would delete all references to seniority, as the Company had originally proposed. Stuber replied that the Company's April 14 proposal was the only proposal on the table, but he would take the Union's objections under advisement (R. 82-83; J.A. 306-307, 373-374, 390-396).

B. The Board's Conclusion and Order

The Board found, on the basis of the Company's entire course of conduct summarized above and set forth more fully in the Trial Examiner's decision (J.A. 32-83), that the Company had failed to bargain in good faith with the Union, in violation of Section 8(a)(5) and (1) of the Act (J.A. 109-110, 128). In reaching this conclusion the Board relied, *inter alia*, on the Company's dilatory tactics and refusal to meet with the Union at reasonable times; its refusal to furnish, or unreasonable delay in furnishing, to the Union data relevant to the subjects of bargaining; its abrupt and unexplained shifts in position with respect to proposals which it previously accepted; and its evident intention to stall and not to reach agreement with the Union. The Board ordered the Company to cease and desist from the unfair labor practices found and to bargain with the Union, upon request (R. 110-111, 129).

C. The Decision of the Court of Appeals

In a *per curiam* opinion, the court of appeals "conclude[d] without difficulty" after a "thorough examination of the record" that the Board's findings are supported by substantial evidence on the record as a whole (Pet. A-2) and enforced the Board's order in full (Pet. A-1, A-2).

ARGUMENT

The Company's challenge to the Board's unfair labor practice findings raises only factual issues which do not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. In all events, the facts summarized in the Statement show that the court below was amply warranted in ruling that the Board's findings and conclusions are adequately supported by the record.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel.

NORTON J. COME,
Assistant General Counsel,

NAN C. BASES,
Attorney,
National Labor Relations Board.

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